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Supreme Court, U.S.
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No. 02-314

IN THE

Supreme Court of the United States

LINDA GRAY,

Petitioner,

v.

GENLYTE THOMAS GROUP, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the First Circuit correctly held that Petitioner failed to preserve her objections to the trial court's jury instructions, as required by Federal Rule of Civil Procedure 51, where Petitioner failed to state her objections with specificity after the jury had been charged.

(2) Whether this Court ought to review the First Circuit's interpretation of Federal Rule of Civil Procedure 51, even though (a) Rule 51 is undergoing a substantial amendment; (b) the First Circuit's interpretation has been articulated clearly for the last 50 years; (c) the First Circuit's interpretation is not squarely at odds with the decisions of other circuits or of this Court; and (d) the result below would be the same even if this Court were to reject the First Circuit's interpretation of the rule.

PARTIES BELOW

Respondent has been designated in this Court as "Genlyte Thomas Group, LLC." This is the present and correct corporate name of the party that was the Defendant in the District Court proceedings. At the time the original complaint was filed, the Defendant was designated as "Genlyte Group, Inc.," a designation that carried through to the First Circuit. "Genlyte Group, Inc." was Petitioner's employer for almost the entire period of time that the events in question took place. In April 1998, however, Genlyte Group, Inc. merged with Thomas Industries, Inc., to form Genlyte Thomas Group, LLC, of which Genlyte Group, Inc. was the majority owner.

Throughout the proceedings below, Respondent was usually referred to as "Lightolier," which was the division of Respondent that employed Petitioner at its plant in Fall River, Massachusetts.

RULE 29.6 STATEMENT

Respondent is a Delaware limited liability company, has no parent corporation, and has issued no stock. However, Respondent is 68% owned by The Genlyte Group, Inc., a publicly held company, and 32% owned by Thomas Industries, Inc., a publicly held company.

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REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (Sept. 2002) 5, 6

STATUTES AND RULES INVOLVED

The Petition for Writ of Certiorari accurately sets forth the present text of Federal Rule of Civil Procedure 51. However, Rule 51 is in the process of being amended, and a proposed amended rule was scheduled to be submitted to the Judicial Conference on September 24, 2002. The proposed rule, which represents a complete rewriting of the existing rule, is set forth in Respondent's Appendix.

In addition, the following provisions of Massachusetts state law are at issue, and are set forth in Respondent's Appendix: Mass. Gen. Laws ch. 151B, §§ 1(18), 4(16A).

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains several misstatements and omissions.

First, Petitioner suggests that her case concerned allegations of gender discrimination generally, as well as sexual harassment. Pet. 4. While her Complaint does not specifically mention the "sexual harassment" subsection of the Massachusetts anti-discrimination law, the entire history of the case, up through and including trial, focused solely on claims of sexual harassment.[1] Indeed, the First Circuit recognized as much in its panel decision. Pet. App. 10a.

Petitioner also omits several important statements that the trial judge made during the course of the trial. Petitioner fails to mention that, on the morning of the third day of trial, the judge gave a preliminary instruction as follows:

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1. Petitioner asserted no federal claims. Her complaint was based solely on Massachusetts General Laws, Chapter 151B.

> As you heard from the opening statements, the question is: Whether the environment at Lightolier in the factory where Ms. Gray worked was hostile *to her* and employees in general because of sexual harassment. Now, the plaintiff has to prove four things in order to prove this sexual harassment that she complains about. . . . Three, that the conduct was sufficiently severe and pervasive to cause the work environment in that factory to become hostile or intimidating or humiliating to an objectively reasonable person *in the plaintiff's position* . . . Here, you look not at how she reacted to it but how a reasonably objective person, woman, *in her position*, would have regarded it such as to make the environment hostile.

Trans. 3/13/01 (Forbush Testimony), at 2-3 (emphasis added).[2]

Petitioner omits entirely any discussion of what transpired during the bench conference following the initial jury charge. After the initial jury instructions, the trial judge invited counsel to sidebar to address objections. Trans. 3/21/01, at 84. Counsel for Petitioner merely raised a few objections not pertinent to the appeal below. *Id.* at 84-86. He did not object to the failure of the trial judge specifically to direct the jury to consider a woman "in the plaintiff's position," nor did he object to the trial judge's choice of the word "totality" over the word "cumulative"

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2. The emphasized language is precisely the wording that Petitioner later requested the trial judge to give in her supplemental instruction to the jury — a fact that the First Circuit recognized. *See* Pet. App. 13a.

in communicating the concept that the jury could consider all of the allegedly harassing conduct that they found to have occurred — again, errors that Petitioner later urged on appeal.

Significantly, Petitioner fails to advise this Court that the trial judge actually instructed Petitioner's counsel that he needed to be more specific in his objections in order to preserve them, and that he eschewed "cluttering up the record" at his own peril. *Id.* at 85. Counsel ignored this advice. In fact, although Petitioner's counsel suggested that Respondent's counsel had misstated the law in her closing argument (a point urged below and reiterated to this Court), he did not identify what that misstatement was or what he wanted the judge to do about it. *Id.* at 85-86.[3]

Petitioner also misrepresents certain aspects of the conference preceding the supplemental instruction. First, Petitioner suggests that Respondent's counsel agreed with Petitioner's proposed supplemental instruction and disagreed with the judge's version. Pet. 5; Pet. App. 50a. To the contrary, Respondent's counsel was merely expressing his opinion that the trial judge had given a correct instruction earlier when she told the jury to consider a reasonable person "in the plaintiff's position" in determining whether the objective element of Petitioner's *prima facie* case had been met. Pet. App. 50a. Respondent's counsel was by no means endorsing Petitioner's proposed supplemental instructions. In fact, when the trial judge shortly thereafter indicated that "putting Ms. Gray into Question 3 is bound to confuse the jury," Respondent's counsel agreed with the court's position by stating, "That's true." *Id.*

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3. Petitioner's counsel also failed to object to the alleged misstatement during Respondent's closing argument.

Finally, Petitioner claims that the trial judge did not afford the opportunity for a sidebar conference to address objections after the supplemental charge had been delivered. Pet. 6. Petitioner also speculates that the judge did not have a sidebar conference because she had just heard arguments from counsel on the supplemental instructions. *Id.* Petitioner points to nothing in the record suggesting that the trial judge cut off Petitioner's counsel, or even that he requested a sidebar (which he did not). Pet. App. 53a. Indeed, as noted *supra*, the trial judge went out of her way to caution Petitioner's counsel to make a proper record of his objections. Trans. 3/21/01, at 85. The most likely explanation for the lack of a sidebar at that time is, rather, the perfunctory statement by Petitioner's counsel that his objections were "just the ones previously stated" — a clear indication that he did not wish to proceed with a sidebar.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari for three reasons. First, the issues presented will soon be moot because Rule 51 is in the process of a substantial amendment. Second, the issues presented lack sufficient importance to warrant this Court's review. Third, the relief that Petitioner seeks would not change the outcome below.

I.

THE COURT SHOULD DENY THE WRIT BECAUSE RULE 51 IS UNDERGOING A SUBSTANTIAL AMENDMENT.

The Court should deny the writ because Federal Rule of Civil Procedure 51 is in the final stages of a substantial revision (a fact that Petitioner has completely ignored). Since the text that Petitioner is asking this Court to construe will, in all likelihood, shortly cease to be operative, review by this Court is not warranted.

In August 2001, the Advisory Committee on Civil Rules published for comment proposed amendments to a number of the Federal Rules of Civil Procedure, including Rule 51. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE ("STANDING COMMITTEE REPORT"), at 8 (Sept. 2002). Following public comment, the Advisory Committee submitted the proposed amendments to the Standing Committee on Rules of Practice and Procedure, with a recommendation that they be approved and transmitted to the Judicial Conference. *Id.* The Standing Committee met on June 10-11, 2002, and recommended that the proposed amendments to the Federal Rule of Civil Procedure, including the amendment to Rule 51, be approved by the Judicial Conference and transmitted to this Court, with a recommendation that they be adopted and sent to Congress for approval. *Id.* at 25.

As of the writing of this brief, the Judicial Conference was scheduled to meet on September 24, 2002, to consider the proposed amendments. If, as is likely, the Judicial Conference transmits the proposed amendments to this Court,

the Court will have until May 1, 2003, to transmit the amendments to Congress. 28 U.S.C. § 2074(a) (1994). Congress will then have until December 1, 2003, to act on the proposed amendments. *Id.* In the absence of action by Congress, the amendments will take effect as of December 1, 2003. *Id.*

The proposed amendment represents a complete rewriting of Rule 51. STANDING COMMITTEE REPORT, App. B, at 1. Undoubtedly, the circuit courts will be called upon to interpret the new language. These interpretations may ultimately conflict, or they may be in harmony. If the Court wants to examine the proper timing of objections to jury instructions, it would be more efficient and more productive to wait for such time, if ever, as these questions present themselves under the new rule. If, on the other hand, the existing rule is retained, the Court will undoubtedly be presented with future cases through which it could consider the issues that Petitioner raises, unclouded by the possibility of its decision becoming moot because of changes in the text.

The Court has previously rejected a petitioner's invitation to interpret language in a rule that is about to change. In *Braxton v. United States*, 500 U.S. 344 (1991), the Court granted certiorari to resolve a conflict among the circuits as to the proper interpretation of a particular phrase in the Federal Sentencing Guidelines. After certiorari was granted, the Federal Sentencing Commission published for public comment an amendment to the guideline at issue. The proposed amendment was intended to resolve the exact question the Court had been asked to consider. *Id.* at 347.

Noting that "Congress necessarily contemplated that the Commission would periodically review the work of the

courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," a unanimous Court declined to issue an interpretation of the pertinent language. *Id.* at 348. The Court stated that "[w]e choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2." *Id.* at 348-49.[4]

The case for declining review here is even more compelling. The proposed revisions to Rule 51 have passed the public comment stage, and are nearing the end of a lengthy and thorough rulemaking process. They have been reviewed by numerous and respected jurists, academics, and members of the bar. The time and resources devoted to the proposed revisions have been extensive. Shortly, the Court will be called upon to consider these revisions, and, if approved, to transmit them to Congress. In light of these developments, review of Rule 51 in its current form would serve no useful purpose. Respondent respectfully submits, therefore, that the writ should not issue.

II.

THE PETITION DOES NOT PRESENT A QUESTION OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW.

Even if the pending amendment to Rule 51 is not dispositive of the Petition, the Court should deny the writ because the Petition does not present a question of sufficient importance to warrant the Court's discretionary review.

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4. The Court also noted that the case could be resolved on other grounds. *Id.* at 349.

The First Circuit's interpretation of Rule 51 has been articulated clearly for 50 years. Practitioners in the First Circuit, such as Petitioner's trial counsel, can and should be expected to adhere to the rule. This is particularly true where, as here, the trial judge not only allowed counsel the opportunity to preserve the record properly, but actually encouraged them to do so. Furthermore, the First Circuit is not, as Petitioner suggests, a renegade circuit whose interpretation of Rule 51 flies in the face of every other circuit and this Court. The interpretations of Rule 51 are slight variations on the same theme, and there is no pressing reason for the Court to choose among them.

A. Petitioner's trial counsel simply ignored the First Circuit's clear and long-standing interpretation of Rule 51.

The First Circuit's jurisprudence on Rule 51 has been crystal clear and unchanged for nearly 50 years. *See* Pet. 9; *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 809 (1st Cir.) (citing consistent First Circuit decisions going back to 1955), *cert. denied*, 488 U.S. 955 (1988). In most instances, the First Circuit requires objections to jury instructions to be restated after the charge is given but before the jury retires. *See, e.g., Davis v. Rennie*, 264 F.3d 86, 100 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1909 (2002). While exceptions are permitted in limited circumstances, *see Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 7-9 (1st Cir. 2001); *Harrington v. United States*, 504 F.2d 1306, 1317 (1st Cir. 1974), it is clear that a prudent practitioner in the First Circuit will follow the general rule if he wants to be sure of preserving his points for appeal.

This is neither a difficult nor a complicated burden. Petitioner's counsel is not a neophyte who may have been tripped up by the strict application of a procedural rule. He has more than 30 years of experience practicing in Massachusetts, including practice before the District Court for the District of Massachusetts. Indeed, not long before the trial in this case began, Petitioner's counsel tried another employment case in the same court before the same trial judge. Petitioner's counsel must have known, and certainly should have known, of the First Circuit's approach to jury instructions and preserving objections to them. Counsel's failure to follow a clearly articulated rule does not create an issue that merits this Court's attention. Review by this Court is particularly inappropriate given that the substantive issues in the case are pure issues of state law; Petitioner's complaint alleged violations of Massachusetts statutory law, only.

The particulars of this case aside, there is no reason to think that practitioners in the First Circuit cannot easily comply with the First Circuit's rules in this area. Respondent respectfully submits that relieving counsel of the relatively trivial burden of restating their objections after the jury charge is not a matter of such importance that it should further occupy the Court's limited time.[5]

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5. Petitioner's suggestion that the trial judge prevented her counsel from making an appropriate record is meritless. Indeed, the judge affirmatively *encouraged* Petitioner's counsel to do so, warning him that his attempts to short circuit the process to avoid "cluttering up the record" could prevent his objections from being preserved. Trans. 3/21/01, at 85. Similarly, the record does not support Petitioner's contention that the trial judge did not permit a sidebar conference following the supplemental instruction to the jury. The record clearly shows that Petitioner's counsel did not request one, even when it was clear that the judge was about to send the jury back to continue their deliberations. Pet. App. 53a.

B. The First Circuit does not interpret Rule 51 in a manner that is radically different from other circuits or this Court.

Petitioner's argument that the First Circuit is a renegade circuit that interprets Rule 51 conversely to every other circuit is incorrect. Rather, to the extent there are differences among the circuits, these differences represent numerous points along a spectrum, rather than a stark contrast.[6] The Fifth and Eighth Circuits, for example, take a relatively strict approach, recognizing that Rule 51 generally requires an objection to be made after the charge is given but before the jury retires. *See Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275, 1279 (5th Cir. 1980); *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1111 (8th Cir. 2002). The Fifth Circuit permits an exception to this rule where "the party's position has previously been made clear to the court and it is plain that a further objection would have been unavailing." *Lang*, 624 F.2d at 1279. The Eighth Circuit adopts a slightly different approach, and permits an exception where the panel "is convinced that the district court understood that [the appellant] intended to preserve its objections for appeal." *Ross*, 285 F.3d at 1112. The Eighth Circuit does not, however, recognize a "futility"

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6. The Committee Note to the proposed new Rule 51 recognizes this reality, stating that

> Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions are also made to cover some practices that cannot now be anchored in the text of Rule 51.

Resp. App. 3a.

exception. *See Starks v. Rent-a-Center*, 58 F.3d 358, 362 (8th Cir. 1995) ("[C]oncern that the trial judge would prefer no objection or the view that the objection would be futile does not relieve parties from making an objection to preserve errors for review."). The Ninth Circuit, also following a strict approach, will not waive a party's failure to make a proper objection unless "(1) throughout the trial the party argued the disputed matter with the court, (2) it is clear from the record that the court knew the party's grounds for disagreement with the instruction, and (3) the party offered an alternative instruction." *Gulliford v. Pierce County*, 136 F.3d 1345, 1348 (9th Cir.) (quoting *Glover v. BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993)), *cert. denied sub nom. Thrash v. Gulliford*, 525 U.S. 828 (1998).

Several circuits take a middle ground, obviating the need to restate objections where "the party had previously made its position clear to the trial judge and any further attempt to change the judge's mind would have been futile," *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997); where "the trial judge knew both that the party in fact objected to the instruction and the basis for that objection," *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 547 (6th Cir. 1995); where "(1) the party's position has been previously made clear to the court; *and* (2) further objection would be unavailing and futile," *Chestnut v. Hall*, 284 F.3d 816, 820 (7th Cir. 2002) (citing *Carter v. Chicago Police Officers M.L.*, 165 F.3d 1071, 1078 (7th Cir. 1998)) (emphasis in original); "where a party has made its position clear to the court previously and further objection would be futile," *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999); and where "the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing." *Perkinson v.*

Gilbert/Robinson, Inc., 821 F.2d 686, 693 (D.C. Cir. 1987) (quoting *Stewart v. Ford Motor Co.*, 553 F.2d 130, 140 (D.C. Cir. 1977)). At the other end of the spectrum is the Third Circuit, which holds that requesting an instruction and obtaining an adverse ruling is always sufficient to preserve an objection. *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 277 (3d Cir. 1998).[7]

Furthermore, the First Circuit's approach does not conflict with this Court's rulings. Contrary to Petitioner's analysis, the Court has not squarely addressed the proper interpretation of Rule 51, and, in any event, the cases that Petitioner cites are distinguishable. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court did not even mention Rule 51, let alone conduct an analysis of its provisions or make a pronouncement as to its proper application. While the Court did consider and reject a waiver argument, without specifically mentioning Rule 51, it did so on facts that are substantially different from those that Petitioner presents. Before the charge, petitioners'

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7. The positions of the Fourth and Tenth Circuits are unclear, and are not elucidated by Petitioner's citations. In *Eberhardt v. Integrated Design & Construction, Inc.*, 167 F.3d 861 (4th Cir. 1999), the issue, mentioned briefly in a footnote, was the *specificity* of the objection, not the timing. *Id.* at 866 n.1. The Fourth Circuit arguably adopted a flexible approach in *City of Richmond v. Madison Management Group, Inc.*, 918 F.2d 438 (4th Cir. 1990), but the court's discussion is ambiguous and is, in any event, dictum, given the court's finding that the appellant had not properly preserved its objection even under a loose standard. *Id.* at 453-54. The Tenth Circuit, as well, seems to allow some exceptions to a rigid enforcement of Rule 51, but the case to which Petitioner cites does not define the criteria that are relevant to the Tenth Circuit's analysis of this question. *See Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1262 n.5 (10th Cir. 1998).

counsel and the court had repeated discussions over the proper scope of a conspiracy instruction in the context of an anti-trust case. In every instance, counsel clearly articulated his position, and in every instance the court rejected it. After the charge was delivered, the judge specifically advised counsel that all prior objections were preserved, and invited them to raise only new objections. *Id.* at 26-27.

Here, by contrast, the record of the pre-supplemental instruction conference does not reveal clear and specific requests followed by clear and specific objections. Rather, counsel for both parties and the trial judge engaged in a nuanced and cooperative discussion aimed at crafting the correct verbiage to respond to the jury's question. Numerous issues and requests were intertwined, and consideration of one topic often led to the raising of another. It was through this iterative process, not through clear requests and denials, that the trial judge formulated the supplemental instruction that was ultimately given. Pet. App. 34a-51a. In at least some instances, it was not at all clear that Petitioner's counsel and the trial judge were understanding each other. In fact, as to one issue, the panel decision noted that "the colloquy bogged down in a misunderstanding as to whether Gray was complaining about what Genlyte's counsel had said or claiming that the affirmative instructions by the court were mistaken." *Id.* at 19a. To the limited extent that *Sunkist* may relate to Rule 51, therefore, it has no application to this case.

The remaining Supreme Court cases that Petitioner cites analyze not Rule 51, but the analogous Rule of Criminal Procedure, Rule 30. The differences do not end there, however. In *Jones v. United States*, 527 U.S. 373 (1999), the petitioner failed even to attempt an objection before the jury retired, so the Court applied the "plain error" standard.

In any event, *Jones* simply stands for the proposition that an objection to a substantive point of law, raised in a directed verdict motion, can be sufficient to preserve that point for review — something that never happened in the present case. *Id.* at 388.[8] Similarly, *Osborne v. Ohio*, 495 U.S. 103 (1990), involved an important constitutional question that was first raised in a motion to dismiss. *Id.* at 123-24.

In short, Petitioner asks this Court to consider and reverse a position that the First Circuit has taken for 50 years; that should be of little concern to litigants whose counsel simply follow the rules; and that does not represent a radical departure from a nationally accepted practice. Should the Court grant certiorari, it will be faced with the task not of choosing between two or three clear-cut alternatives, but of thoroughly evaluating the nuances of each circuit and then choosing among them or fashioning a completely new approach. The Court's review would be complicated further because many of the circuits' approaches are fact driven, and not susceptible of a bright-line test.[9] Given the limited importance of the issues presented, the ease with which counsel in the various circuits can learn and adhere to their particular circuit's practice, and the fact that Petitioner's

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8. The case on which *Jones* relied for this proposition, *Leary v. United States*, 395 U.S. 6 (1969), involved a constitutional issue that was raised in a direct verdict motion, and subsequently considered by the appellate court. *Id.* at 32.

9. Indeed, one of the virtues of the First Circuit's approach is that, in almost all cases, it gives counsel a clear set of rules to follow, and leaves little doubt in the minds of counsel or the trial courts about the steps that must be taken to preserve objections to jury instructions for appellate review.

counsel in this case simply passed on the opportunity to make the proper record at the proper time, Respondent respectfully suggests that review by the Court is not warranted.

III.

PETITIONER'S CHALLENGES TO THE JURY INSTRUCTIONS WOULD NOT SURVIVE, EVEN UNDER A MORE GENEROUS STANDARD OF REVIEW THAN PLAIN ERROR.

The Court should also deny the writ because the outcome below would not change, even if Petitioner had properly preserved her objections and the First Circuit had applied the more lenient "harmless error" standard.

Petitioner raised five challenges to the jury instructions. In one instance, the First Circuit found that "[Petitioner's] requested instruction was flatly wrong and [we] would reject this claim of error even if it had been properly preserved by a post-instruction specific objection, which it was not." Pet. App. 16a. As to another, the court noted that, while the jury might have been misled if the instruction were viewed in isolation, "we think it highly unlikely that, in the context of the trial as a whole, the jury misunderstood," and that "the supplemental instruction might well be error if taken alone; but in the context of the trial it is doubtful that the jury was misled." *Id.* at 13a-14a. As to a third, in which Petitioner urged error in the trial court's use of the word "totality" instead of the word "cumulative," the panel found that, while there might be differences in nuance between the two words, "this might be debated and vary from case to

case."[10] *Id.* at 14a. Finally, as to Petitioner's challenge to a phrase in the middle of Respondent's closing argument that allegedly constituted an incorrect statement of law, the First Circuit observed that "it is virtually impossible to find that the district court's failure to correct a four-word qualifying phrase, used in a single sentence of defense counsel's lengthy closing argument, was likely to have altered the outcome of the case." *Id.* at 19a.

The one instruction that the First Circuit arguably characterized as erroneous concerned "the relationship between sexual harassment and intimidation." *Id.* at 9a. Petitioner contended that the trial court impermissibly focused the jury's attention on explicitly sexual conduct, such as crotch-grabbing or offensive tongue gestures, to the exclusion of conduct that was less explicitly sexual, such as following the Petitioner home.

The First Circuit recognized that, unlike Title VII, Chapter 151B of the Massachusetts General Laws specifically defines "sexual harassment," limiting conduct that is actionable to "conduct of a sexual nature." *Id.* at 10a (quoting Mass. Gen. Laws ch. 151B, § 1(18)). The First Circuit also recognized that the instruction at issue followed the language of the Massachusetts statute, "and then went a bit beyond in Gray's favor." *Id.* at 11a. The panel recognized that the instruction "tracks (or is more favorable than) the statute taken literally, and there is little direct Massachusetts precedent." *Id.* at 12a. The panel also noted that "the jury

10. Significantly, the court had used almost exactly the same language in the initial charge, yet Petitioner's counsel did not object at that time. Trans. 3/21/01, at 74. Counsel first raised this objection when the trial judge repeated the "totality" language in the supplemental instruction.

may well have understood the instruction given to encompass *all* of Hermenegildo's reprehensible conduct." *Id.* (emphasis in original).

Nevertheless, relying on an unreported decision of the state trial court, the First Circuit concluded that the Massachusetts Supreme Judicial Court would, if presented with the question, conclude that "acts of intimidation may be part of 'sexual harassment' based on context alone," and that juries should be so instructed "in the future." *Id.* (citing *Dahms v. Cognex Corp.*, 2000 WL 33170952 (Mass. Super. Ct. Nov. 20, 2000)). It is unclear whether the panel, by using the phrase "in the future," intended to signal that it would have let the instruction stand under a "harmless error" analysis. In any event, it is difficult to understand how an instruction that admittedly followed the applicable statutory language, with little pertinent decisional authority, could have been erroneous under any standard.

In short, even if Petitioner's objections were properly preserved, and were analyzed under a more generous standard of review than plain error, the result would be the same at least as to four of the alleged errors, and should be the same as to the fifth. Under such circumstances, review by this Court is not warranted. Given that the one jury instruction the panel found arguably incorrect involves the pure interpretation of a state statute on an issue not yet addressed by the state's highest court, certiorari review is particularly inappropriate.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT RULE AND STATUTES

Proposed Amended Federal Rule of Civil Procedure 51

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

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(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Scope. Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51. Among these

instructions are preliminary instructions to a venire, and cautionary or limiting instructions delivered in immediate response to events at trial.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phrase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that trial evidence may raise new issues or reshape issues the parties thought they had understood. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the

case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

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Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

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Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. U.S.*, 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, *U.S v. Atkinson*, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.")

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

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Mass. Gen. Laws ch. 151B, § 1(18)

The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.

Mass. Gen. Laws ch. 151B, § 4(16A)

It shall be an unlawful practice . . . [f]or an employer, personally or through its agents, to sexually harass any employee.